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CENTERIOR SERVICE COMPANY v. ACME SCRAP IRON & METAL CORPORATION: COST RECOVERY OR CONTRIBUTION IN THE SIXTH CIRCUIT?

I. INTRODUCTION

A recurrent difficulty facing today's courts is the proper application of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),¹ a law enacted in 1980 by Congress to address the increasing threat of pollution by providing for timely and efficient cleanup of hazardous waste.² Specifically, this Note will address whether, under CERCLA, responsible parties may seek recovery costs from other responsible parties through a cost recovery action, or are limited to an action for contribution.³ Courts have been forced to address this issue since the enactment of the 1986 amendment to CERCLA, the Superfund Amendments and Reauthorization Act of 1986 (SARA).⁴

1. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-75 (1994)) [hereinafter CERCLA].

2. See *id.* § 107, 42 U.S.C. § 9607. CERCLA "imposes liability on any person who arranges for the disposal, treatment or transport of any hazardous substance which is released, or is threatened to be released, and causes the incurrence of response costs." Jones v. Inmont Corp., 584 F. Supp. 1425, 1428 (S.D. Ohio 1984). The statute further "requires notification of the existence of dump sites and the occurrence of releases from them" *Id.* at 1428; see New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1120-21 (3d Cir. 1997) (imposing strict liability under section 107(a) for potentially responsible parties regarding hazardous waste cleanup and other site remediation); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1500 (11th Cir. 1996) (explaining CERCLA targets national problem of hazardous waste cleanup); Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986) (holding Congress enacted CERCLA as result of danger to public and environment due to widespread presence of hazardous substances).

3. See County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1515 (10th Cir. 1991) (defining contribution as "a statutory or common law right available to those who have paid more than their equal share of a common liability"); see also Huggins v. Graves, 337 F.2d 486, 489 (6th Cir. 1964) (defining nature and scope of contribution).

4. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9613-9700 (1994)) [hereinafter SARA]. See Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 349 (6th Cir. 1998) (acknowledging enactment of SARA resulted in "controversy . . . regarding whether PRPs [potentially responsible parties] who themselves contributed to the contamination of a hazardous waste site could seek joint and several cost recovery as well as contribution"); Mark A. Stach, *Only Innocent Parties Need Apply: The Death of Private Party Cost Recovery Actions Under*

SARA explicitly provides a right of contribution for hazardous waste cleanup in section 113.⁵ This change in the original legislation created the current controversy under CERCLA.⁶ Parties who initiated and paid for cleanup continued to seek cost recovery under CERCLA section 107 from other potentially responsible parties.⁷ The section 107 cost recovery action imposes strict liability and simplifies the process of recovery by allowing these parties to sue one another without concern for the degree of fault, rights

Superfund?, 20 WM. & MARY ENVTL. L. & POL'Y REV. 33, 36 (1995) (stating that "[s]ome of the confusion engendered by . . . [CERCLA] revolves around its provisions for the recovery of costs by private parties who have expended funds to cleanup sites. Nowhere is this confusion more apparent than in court decisions dealing with CERCLA's two statutory mechanisms for the recoupment of cleanup costs"); cf. *Rumpke, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1240 (7th Cir. 1997) (stating decisions regarding these two sections are not clear); *United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994) (asserting problem made more difficult due to courts declining to imply other rights of action unless expressly directed by Congress); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989) (noting CERCLA's legislative history is widely recognized as vague, indefinite and, in some respects, contradictory) (citing *United States v. Mottolo*, 605 F. Supp. 898, 902, 905 (D.N.H. 1985)).

5. See CERCLA § 113, 42 U.S.C. § 9613. The additional section provides in pertinent part:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1). See S. REP. NO. 99-11, at 43 (1985) (discussing enactment of section 113 which "clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially responsible persons, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances"); see also *County Line Inv. Co.*, 933 F.2d at 1516 (explaining Congress addressed these actions by creating express right of contribution under section 113); *Boeing Co. v. Cascade Corp.*, 920 F. Supp. 1121, 1132 (D. Or. 1996) (determining that section 113 creates express right of contribution); *Sun Co. v. Browning-Ferris Inc.*, 124 F.3d 1187, 1190 (10th Cir. 1997) (finding "Congress codified this implicit right to contribution with the enactment of the Superfund Amendments and Reauthorization Act of 1986 (SARA) . . ."); H.R. REP. NO. 99-253, pt. 3, at 18-19 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3041 (stating section 113 serves to set forth unequivocal statement regarding contribution claims and judicial review).

6. See *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1304 (9th Cir. 1997) (blaming SARA for increased litigation under CERCLA); *Adhesives Research Inc. v. American Inks & Coatings Corp.*, 931 F. Supp. 1231, 1237 (M.D. Pa. 1996) (analyzing new provision of CERCLA, court attributes recent dispute to failure to reach uniform decision regarding interaction between sections 107 and 113).

7. See, e.g., *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 933 (8th Cir. 1995) (examining CERCLA liability under section 107 in suit by party initiating cleanup); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1428 (S.D. Ohio 1984) (noting private party engaging in cleanup brought section 107 suit).

which are not available under a section 113 action for contribution.⁸

The addition of the section 113 contribution provision is significant insofar as it prevents any party responsible for hazardous waste pollution from recovering, jointly and severally, from other potentially responsible parties.⁹ In fact, a section 113 contribution action permits only several liability, reduces the statute of limitations by three years, and shifts the burden to the plaintiff to demonstrate the defendant's equitable share of cleanup costs prior to an award.¹⁰

In *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*,¹¹ the Sixth Circuit restricted the responsible plaintiffs to an action for contribution under CERCLA section 113.¹² With this holding, the Sixth Circuit joined the majority of sister circuits on the issue.¹³ The Sixth Circuit justified its results based on statutory construction

8. See *County Line Inv. Co.*, 933 F.2d at 1515 (explaining fault is consideration in action for contribution); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997) (requiring determination of fault in deciding contribution action). Actions for contribution refer to a claim "by and between joint and severally liable parties for an appropriate division of the payment one of them has been compelled to make." *Akzo Coatings Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994). For the language of CERCLA section 107, see *infra* note 34 and accompanying text.

9. See *New Castle County*, 111 F.3d at 1123. Joint and several recovery under section 107 would permit "a potentially responsible person found liable under section 107 . . . [to] recoup all of its expenditures regardless of fault." *Id.* at 1121 (emphasis added). Although the court declined to determine which, if any, private parties may bring cost recovery actions under section 107, it stated "that a potentially responsible person under section 107(a), who is not entitled to any of the defenses enumerated under section 107(b), may not bring a section 107 action against another potentially responsible person." *Id.* at 1124; see also *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995) (prohibiting potentially responsible person from bringing section 107 action).

10. See *Rumpfke*, 107 F.3d at 1241 (stating statute of limitations for section 107(a) action is six years, while three-year statute of limitations applies to action for contribution); *United States v. Taylor*, 909 F. Supp. 355, 361 (M.D.N.C. 1995) (explaining that contribution action requires PRPs to demonstrate damages are both divisible and apportionable); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 229 (W.D. Mo. 1985) (holding liability in action for contribution is only several, not joint and several).

11. 153 F.3d 344 (6th Cir. 1998).

12. See *id.* at 356. The *Centerior* court succinctly concluded "that parties who themselves are PRPs, potentially liable under CERCLA and compelled to initiate a hazardous waste site cleanup, may not bring an action for joint and several cost recovery, but are limited to actions for contribution" *Id.*

13. See, e.g., *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1306 (9th Cir. 1997) (holding responsible parties limited to contribution); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1514 (11th Cir. 1996) (limiting responsible parties to action for contribution); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995) (holding only contribution action available for responsible parties); *United Tech. Corp. v. Browning-Ferris Indus.*,

and policy.¹⁴ Dismissing seemingly contradictory precedent, the Sixth Circuit concluded that its holding represented a fair result, consistent with CERCLA's rationale of quick and efficient hazardous waste cleanup.¹⁵ The *Centerior* court dismissed the minority view and precluded responsible parties from bringing section 107 cost recovery actions, thereby eliminating the possibility of simple and complete reimbursement for cleanup costs.¹⁶

This Note will analyze the Sixth Circuit's decision in detail. Section II presents the factual basis for the *Centerior* court's decision.¹⁷ Section III analyzes CERCLA as originally enacted, as well as the changes resulting from SARA.¹⁸ Section IV provides an in-depth examination of the Sixth Circuit's reasoning and Section V provides a critical discussion of the court's decision.¹⁹ Finally, Section VI explains the potential negative impact of the Sixth Circuit's decision.²⁰

II. FACTS

In *Centerior*, the Court of Appeals for the Sixth Circuit addressed whether a party "who themselves contributed to the contamination of a hazardous waste site could seek joint and several recovery as well as contribution."²¹ The suit involved plaintiffs Centerior Service Company, General Electric Company and Ashland Oil, Incorporated, and concerned a waste oil reclamation facil-

Inc., 33 F.3d 96, 101 (1st Cir. 1994) (ruling responsible parties can only bring contribution suit).

14. See *Centerior*, 153 F.3d 349-57 (utilizing combination of CERCLA analysis and environmental policy to justify result). For a discussion of the statutory basis for this construction, see *infra* notes 59 & 62 and accompanying text. For a discussion of the policy discussion behind the Sixth Circuit's decision, see *infra* notes 110-13 and accompanying text.

15. See *id.* at 353 (explaining that "our reading of the statute to preclude [plaintiffs] from seeking joint and several cost recovery will not impede the goals of CERCLA"). For the legislative history and purpose of CERCLA as originally enacted and as amended by SARA, see *supra* notes 2 & 4 respectively.

16. See *id.* at 355 (concluding PRPs are limited to actions for contribution provided by section 113(f)).

17. For the factual basis for the court's decision in *Centerior*, see *infra* notes 21-31 and accompanying text.

18. For an explanation of CERCLA and SARA, see *infra* notes 32-91 and accompanying text.

19. For the rationale and critique of the Sixth Circuit's holding in *Centerior*, see *infra* notes 92-132 and accompanying text.

20. For a discussion of the potential effect of the Sixth Circuit's decision, see *infra* notes 133-37 and accompanying text.

21. *Centerior*, 153 F.3d at 347. The Sixth Circuit received the appeal pursuant to section 1292(b) and Federal Rule of Appellate Procedure Five. See *id.* at 347.

ity and its subsequent cleanup following hazardous waste pollution.²²

The site, in operation for more than forty years, was a dump site for waste oil used by many parties.²³ A joint investigation by the United States Environmental Protection Agency (EPA) and the Ohio Environmental Protection Agency uncovered several violations of federal environmental standards.²⁴ EPA subsequently issued an administrative order.²⁵ The order required plaintiffs to clean the site, and, upon compliance with the order, the plaintiffs allegedly incurred 9.5 million dollars in costs.²⁶ In order to recover the costs not directly attributable to them, plaintiffs filed suit against more than 125 defendants under CERCLA section 107(a) to recover, jointly and severally, the costs they incurred during this cleanup.²⁷

22. *See id.* Following an investigation, four parties were attributed with responsibility for the contamination: "(1) Ashland Oil, the current owner/operator of the site; (2) Huth Oil, a previous owner; (3) Cleveland Electric Illuminating Co.; and (4) plaintiff General Electric Company." *Id.* at 346 (footnotes omitted).

Plaintiff Ashland Oil owned the site from 1964 until its purchase by Huth Oil in 1981. *See id.* Named party Cleveland is represented in the suit by plaintiff Centerior Service Company, its parent company. *See id.* at n.2. Plaintiffs Centerior Service Company and General Electric Company were adjudged responsible by the Environmental Protection Agency (EPA) based on its finding that they "had each arranged for disposal of hazardous substances on the site." *Id.* at 346.

23. *See id.* In operation for more than forty years, the site consists of "33 oil storage tanks with a 992,000 gallon storage capacity." *Id.* EPA was concerned not with the parties dumping oil at the site, but those responsible for the poor conditions; the EPA identified four PRPs that played a hand in the poor conditions of the site: (1) Ashland Oil, the current owner/operator of the site; (2) Huth Oil, a previous owner; (3) Cleveland Electric Illuminating Co.; and (4) Plaintiff General Electric Co. *Centerior*, 153 F.3d at 346 (citations omitted).

24. *See id.* EPA found that hazardous substance contaminated both the tanks and surrounding soils, that mandated upkeep was lacking, "that its oil tanks were corroded, and that unauthorized access to the site was possible through gaps in the fence surrounding it." *Id.*

25. *See id.* EPA is authorized to issue such orders in accordance with 42 U.S.C. § 9606(a). *Id.* The statute authorizes EPA to issue these orders when it finds a site creates an "imminent and substantial endangerment to the public health or welfare or the environment." CERCLA § 106(a), 42 U.S.C. § 9606(a) (1994). Administrative orders are successful primarily due to the penalties they threaten: "If a party fails to comply with a § 106 order it faces penalties of up to \$25,000 per day and damages in an amount up to three times the cleanup costs." *Id.* at 346 n.4.

26. *See id.* at 346. The cleanup required:

securing the site; sampling; developing work-plans; removing, storing, and disposing of all free standing oil in dikes surrounding the oil storage tanks; repairing cracked or slumping dikes; dismantling tank equipment; removing, treating, and disposing all hazardous substances or waste-contaminated liquids, soils and sludges; and installing a compacted clay cover over the cleaned areas.

Id. at 346 n.5.

27. *See id.* at 346-47.

Following consolidation, the District Court for the Northern District of Ohio determined that all of the claims were necessarily contribution claims under CERCLA section 113(f).²⁸ Plaintiffs appealed, contending that potentially responsible parties are not excluded from section 107(a) recovery because the determination of whether a party may pursue a section 107 cost recovery action "depends only on whether a party has incurred necessary costs of response."²⁹ Response costs, the plaintiffs further argued, have been determined to include much more than mere cleanup.³⁰ The Sixth Circuit rejected these arguments and affirmed the district court, holding that parties who themselves contribute to contamination, the determining factor, are limited to reimbursement through contribution actions governed by CERCLA section 113(f).³¹

III. BACKGROUND

A. CERCLA

Before analyzing the Sixth Circuit's decision in *Centerior*, it is necessary to examine CERCLA and trace its implementation and impact since its enactment by Congress in 1980. This examination is especially important to identify methods for cleanup cost reimbursement permitted under the statute.

Enacted in response to heightened environmental awareness and the growing utilization of hazardous substances, CERCLA's pri-

28. See *id.* The district court faced the issue after defendants filed briefs disputing plaintiffs' standing to pursue an action under section 107(a), contending "they were limited to bringing contribution claims under CERCLA [section] 113(f), 42 U.S.C. [section] 9613(f)." *Id.* For the text of relevant portions of section 113(f), see *supra* note 5 and accompanying text.

The district court agreed and "resolved all ten motions by ruling that the plaintiffs, as PRPs, were limited to bringing a cause of action for contribution under [section] 113(f) of CERCLA, and that all of the plaintiffs' original complaints pleading joint and several cost-recovery actions under [section] 107(a) would be construed as asserting a contribution claim under [section] 113(f)." *Id.* at 346-47.

29. *Centerior*, 153 F.3d at 350.

30. See *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 762 (7th Cir. 1994). These response costs may involve much more than simply hauling away contaminated substances, as in *Akzo Coatings, Inc. v. Aigner Corp.*, where plaintiffs sought to recover costs greater than \$1.2 million for: (1) fencing off and otherwise securing the facility; (2) securing and removing all drums, tanks, and other containers of hazardous waste from the premises, including buried containers; and (3) determining the extent to which the soil was contaminated and removing any soil that was visibly polluted. *Id.*; see *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 936 (8th Cir. 1995) (finding recoverable response costs include costs incurred in identifying contaminants and their source).

31. For the Sixth Circuit's analysis, see *infra* notes 92-114 and accompanying text.

mary purpose is to provide a means for fast and efficient cleanup of dangerous pollutants.³² The statute also insures that the parties responsible for contamination are those financing the cleanup effort, either directly or through reimbursement.³³ Section 107(a) furthers this goal by awarding the government, and certain private parties, recovery costs incurred during qualified cleanups.³⁴

32. See *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997) (examining implementation of CERCLA and stating that section 107 cost recovery action was traditionally used by government in efforts to recoup response costs); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1500 (11th Cir. 1996) (explaining CERCLA aims to achieve hazardous waste cleanup); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995) ("One primary goal of this private cost-recovery framework [section 107(a)] is to 'encourage timely cleanup of hazardous waste sites.'") (quoting *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990)); see also *Rumpke, Inc. v. Cumming Engine Co.*, 107 F.3d 1235, 1236 (7th Cir. 1997) (stating "cleanup will be less likely to occur if potentially responsible parties do not come forward, yet the often astronomical sums needed to restore these sites can deter prompt remedial action").

33. See *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989) (emphasizing that CERCLA's explicit recovery applies to costs incurred by government and innocent parties conducting cleanup).

34. See CERCLA § 107(a), 42 U.S.C. § 9607(a). The cost recovery section provides:

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

CERCLA § 107(a), 42 U.S.C. § 9607(a). See *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997) (noting section 9607(a) "authorizes

This original provision imposed strict, joint and several liability on responsible parties.³⁵ As a result, liability under section 107(a) is administered without regard to the degree of fault.³⁶ The rule of imposing damages without regard to degree of fault, however, is subject to an exception: liability may be apportioned when the defendant is able to prove that the damages are divisible.³⁷ This burden of proof is sometimes difficult to establish, though, because of the nature of environmental cleanups and the requirement that the defendant demonstrate both that the "harm is divisible and that the damages are capable of some reasonable apportionment."³⁸

suits against certain 'statutorily defined "responsible parties" to recover costs incurred in cleaning up hazardous waste disposal sites') (quoting *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1455 (9th Cir. 1986)). See, e.g., *Walls v. Waste Resource Corp.*, 761 F.2d 311, 314 (6th Cir. 1985) (permitting homeowners and residents near site, innocent parties, to recover because contamination of water through toxic wastes at nearby landfill threatened their health); *United States v. ASARCO, Inc.*, 814 F. Supp. 951, 954 (D. Colo. 1993) (involving complaint by United States to recover cleanup costs incurred in cleanup of Superfund site in California); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1427 (S.D. Ohio 1984) (allowing innocent, adjacent landowners to recover response costs under CERCLA).

35. See *New Castle County*, 111 F.3d at 1121 (explaining that any successful action under CERCLA section 107(a) will hold PRPs jointly and severally liable); *Rumpke, Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1240 (7th Cir. 1997) (stating section 107(a) makes potentially responsible persons subject to joint and several liability); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995) (describing cost recovery actions as imposing strict liability on PRPs for remediation and other cleanup costs); *Farmland Indus. v. Morrison-Quirk Grain*, 987 F.2d 1335, 1339 (8th Cir. 1993) (affirming that section 107 holds PRPs strictly liable for response costs).

36. See *Tippins Inc. v. USX Corp.*, 37 F.3d 87, 92 (3d Cir. 1994) (explaining CERCLA imposes strict liability, liability apportioned without concern for particular degree of fault).

37. See *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993). The Third Circuit conceded that although section 107(a) liability is joint and several, liability may be apportioned when the defendant is able to prove the damages are divisible. See *id.*

38. *New Castle County*, 111 F.3d at 1121 n.4. Damages are apportioned "where there is a reasonable basis for determining the contribution of each cause to a single harm." See *id.* (citing *Rohm & Haas Co.*, 2 F.3d at 1280); *Colorado & E. R.R. Co.*, 50 F.3d at 1535 (explaining divisibility is necessary "[d]ue to the impossibility of determining the amount of environmental harm caused by each party where wastes of varying and unknown degrees of toxicity and migratory potential have mixed").

The guideline used by most courts is provided in the Restatement (Second) of Torts: (1) Damages for harm are to be apportioned among two or more causes where (A) there are distinct harms, or (B) there is a reasonable basis for determining the contribution of each cause to a single harm. (2) Damages for any other harm cannot be apportioned among two or more causes. RESTATEMENT (SECOND) OF TORTS § 433A (1965). See *Redwing Carriers, Inc.*, 94 F.3d at 1513 (utilizing Restatement in explaining divisibility of section 107(a) harm under CERCLA); *In re Bell Petroleum Serv., Inc. v. Sequa Corp.*, 3 F.3d 889, 895 (5th Cir. 1993) (adopting Restatement approach to section 107(a) divisibility); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268-69 (3d Cir. 1992) (same); *United States v.*

Courts impose CERCLA section 107(a) liability according to a four-part test that evolved from the language of the statute.³⁹ In *Amoco Oil Co. v. Borden, Inc.*,⁴⁰ the Fifth Circuit succinctly stated the requirements under this test: 1) the site is a "facility" within the meaning of the Act;⁴¹ 2) a release, or threat of release, of a hazardous substance as defined in the statute occurred;⁴² 3) the plaintiffs incurred cleanup costs due to this release or threat of release;⁴³ and

Monsanto Co., 858 F.2d 160, 172 (4th Cir. 1988) (same). For a discussion of the difficulty in determining environmental damages, see *infra* note 45 and accompanying text.

39. See CERCLA § 107(a), 42 U.S.C. § 9607(a). For the language of this section, see *supra* note 34 and accompanying text.

40. 889 F.2d 664, 668 (5th Cir. 1989). *Amoco Oil Co. v. Borden, Inc.* involved a CERCLA claim by plaintiff Amoco Oil Co., the purchaser of property who knew of the presence of a by-product of fertilizer production, but was unaware of its radioactivity. See *id.* at 666. Plaintiff sought to recover the estimated \$11-17 million dollars necessary to clean the site. See *id.* The Fifth Circuit maintained that once the four factors test is satisfied, a "plaintiff is entitled to summary judgment on the liability issue." *Id.* at 668.

41. See *id.* A facility is "(A) any building, structure, installation, equipment, pipe or pipeline . . . , well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located" CERCLA § 101(b), 42 U.S.C. § 9601(b). See, e.g., *New Castle County*, 111 F.3d at 1120 (agreeing landfill fits easily within facility); *Pinal Creek Group*, 118 F.3d at 1300 (holding water drainage basin contaminated by mining efforts as facility); *United States v. ASARCO, Inc.*, 814 F. Supp. 951, 954 (D. Colo. 1993) (finding mining district containing gold, silver, zinc and lead ore mines, was facility under CERCLA).

42. See *Amoco Oil Co.*, 889 F.2d at 668. A hazardous substance is defined by CERCLA as "(A) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of [CERCLA], . . . [and] (E) any hazardous air pollutant listed under section 112 of the Clean Air Act" CERCLA § 101(14), 42 U.S.C. § 9601(14).

Courts have been reluctant to narrowly define hazardous substance: "[t]he plain statutory language fails to impose any quantitative requirement on the term hazardous substance and we decline to imply that any is necessary." *Amoco Oil Co.*, 889 F.2d at 669. The First Circuit went further, expanding the definition of hazardous substance, to find that radionuclides, the contaminated substance in that case, were a hazardous substance because "[r]adium-226, the primary radioactive waste on the property, decays to form a gas, radon-222 . . . considered radionuclides, which are defined as 'any nuclide that emits radiation.'" *Id.* at 668 (quoting 40 C.F.R. § 61.91(c) (1988)).

43. See *Amoco Oil Co.*, 889 F.2d at 668. The definition of response costs - the cleanup costs at issue - is somewhat more difficult, although still contained in the statutory language:

In [section] 9601(25) 'response' is defined to mean 'remove, removal, remedy, and remedial action' In turn, these terms are further defined in the statute.

Section 9601(23) defines 'remove' or 'removal' to include the cleanup or removal of released hazardous substances from the environments, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or

4) the defendant to the suit falls within one of the categories of potentially responsible parties subject to liability under the statute.⁴⁴

Once a party meets all four of these requirements, damages are awarded without concern for the degree of fault, due to the difficulty of determining divisibility of harm.⁴⁵ In order to recover costs, a plaintiff must demonstrate that its costs are both necessary and consistent with the National Contingency Plan, "a set of regulations promulgated by the EPA that establishes procedures and standards for responding to releases of hazardous substances, pollutants and contaminants."⁴⁶ The damages will be awarded un-

threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

Section 9601(24) defines 'remedy' or 'remedial action' to include, among others, 'those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.'

Id. at 670 n.7 (citing CERCLA § 101, 42 U.S.C. § 9601). The Fifth Circuit read these definitions together finding, "[i]n the absence of any specific direction from Congress, we believe that the question of whether a release has caused the incurrence of response costs should rest upon a factual inquiry into the circumstances of a case and the relevant factual inquiry should focus on whether the particular hazard justified any response actions." *Id.* at 670.

44. *See id.* at 668. The parties subject to CERCLA liability as potentially responsible parties are: "(1) present owners or operators of a hazardous waste site, (2) persons who owned or operated the site at the time when hazardous materials were disposed of at the site, (3) persons who arranged for the disposal of wastes at the site, and (4) persons who transported wastes to the site for disposal." CERCLA § 107(a), 42 U.S.C. § 9607(a).

Courts have utilized the authority to control test to determine PRPs. *See, e.g., Redwing Carriers, Inc.*, 94 F.3d at 1504-05 (utilizing "authority to control" test in determining whether plaintiffs are "operators" of site); *Alko Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994) (finding plaintiff PRP because it is partially liable for site contamination); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir. 1992) (imposing operator liability on party who had "authority to control" hazardous waste site regardless of whether they exercised "actual control" of site).

45. *See United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995) (concluding divisibility of damages in these environmental circumstances is difficult because of mixture of various and unknown wastes with undetermined toxicity and migratory potential); *Boeing Co. v. Cascade Corp.*, 920 F. Supp. 1121, 1121 (D. Or. 1996) (stating, "respective harm to environment caused by parties, for purposes of cost allocation, was best reflected by mass of contaminants which each party contributed to contamination plume").

46. *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120 n.2 (3d Cir. 1997). Plaintiffs must satisfy a two-part test for necessary costs that must comport with EPA regulations. *See Boeing Co.*, 920 F. Supp. at 1132. The test "required

less the defendant proves the existence of a defense sufficient to exonerate the defendant under the statute.⁴⁷

The original legislation did not provide for contribution actions, however, which rendered individual potentially responsible parties liable for the full amount of cleanup costs, with no method of distributing damages among all responsible parties.⁴⁸ The Tenth

by 42 U.S.C. 9605 and finally promulgated on July 16, 1982, appears at 47 Fed. Reg. 31180, 31202 (1982) (to be codified at 40 C.F.R. § 300), . . . [and] adds nothing to the statutory definitions [of response costs].” *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1429 (S.D. Ohio 1984). Thus, the response costs have been interpreted by courts from the statute:

The phrase ‘response costs’ is nowhere defined in the Act, and the word ‘response’ is defined only as ‘remove, removal, remedy and remedial action.’ 42 U.S.C. § 9601(25). Subsection (23) of this section defines ‘remove’ and ‘removal’ to include actions necessary to clean up or remove hazardous substances, to monitor, assess, and evaluate a release, to dispose of removed material, or to prevent, minimize, or mitigate damage to the public or the environment. Specific examples given include security fencing, alternative water supplies, temporary evacuation and housing, and other emergency assistance. Subsection (24) defines ‘remedy’ and ‘remedial action’ as actions consistent with a permanent remedy to prevent or minimize the release of hazardous substances. Specific examples given include containment actions, treatment or incineration, provision of alternate water supplies, and any monitoring reasonably required to assure that the actions taken protect the public and the environment.

Id.

For a discussion of the meaning of response costs under CERCLA, see *supra* note 43 and accompanying text.

47. See *Colorado & E. R.R. Co.*, 50 F.3d at 1535 (explaining damages awarded unless available defense is proven sufficiently). The defenses available to a potentially responsible party are limited, and explicitly stated in the statute:

There shall be no liability under sub section (a) of this section for a person otherwise liable who can establish . . . the damages resulting therefrom were caused solely by -

- (1) an act of God;
- (2) an act of war;
- (3) an act or omission of a third party other than an employee or agent of the defendant
- (4) any combination of the foregoing paragraphs.

CERCLA § 107(b), 42 U.S.C. § 9607(b). See also *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1507 (11th Cir. 1996) (explaining first two defenses rarely used, but third-party defense usually raised).

The statute provides that the defendant must establish, by a preponderance of the evidence, that:

- (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions

CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3).

48. See *Colorado & E. R.R. Co.*, 50 F.3d at 1535. The Tenth Circuit described the problem, under the original CERCLA legislation, which limited section 107(a) cost recovery actions to the government and innocent parties incurring cleanup:

Circuit noted this inequity in *United States v. Colorado & Eastern Railroad Co.*,⁴⁹ and responded by developing an implied right of contribution under CERCLA.⁵⁰ As described in *Jones v. Inmont Corp.*,⁵¹ courts interpreted the "any other person" language of CERCLA section 107 to imply a right to contribution.⁵² This judicially-created

"CERCLA, as originally enacted, left a PRP faced with the prospect of being singled out as the defendant in a cost-recovery action without any apparent means of fairly apportioning CERCLA costs awarded against it to other PRPs." *Id.*

In *Colorado & Eastern Railroad Co.*, EPA filed suit against four parties seeking response costs incurred in cleanup of a Chemical Superfund Site. *See id.* at 1533. Two of the defendants entered into a partial consent decree to finance and perform all cleanup. *See id.* A third defendant entered into a separate agreement, then all four defendants filed claims against one another for section 9607(a) cost recovery or section 9613(f) contribution. *See id.* at 1533-36. The Tenth Circuit limited the claim to one for contribution, finding, "claims between PRPs to apportion costs between themselves are contribution claims pursuant to § 113 regardless of how they are pled." *Id.* at 1539. *Cf. Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989) (suggesting CERCLA as enacted was "'last-minute compromise' between three competing bills . . . [and therefore] 'acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history.'" (quoting *United States v. Mottolo*, 605 F. Supp. 898, 902, 905 (D.N.H. 1985)); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) (acknowledging CERCLA legislative history particularly unhelpful and vague). For a discussion of the confusion caused by the last minute enactment of SARA, see *infra* note 63 and accompanying text.

49. 50 F.3d 1530 (10th Cir. 1995).

50. *See Colorado & E. R.R. Co.*, 50 F.3d at 1535. *See County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1516 (10th Cir. 1991) (explaining courts implied right to contribution under CERCLA due to inequity problem without right to contribution); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 n.3 (9th Cir. 1986) (recognizing inequality if no contribution available); *United States v. New Castle County*, 642 F. Supp. 1258, 1268-69 (D. Del. 1986) (finding justice requires right to contribution); *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1491-92 (D. Colo. 1985) (implying federal right to CERCLA contribution).

51. 584 F. Supp. 1425 (S.D. Ohio 1984). *Jones* involved an action by landowners near an illegal dump site. *See id.* at 1427. Plaintiffs' complaint charged defendants with "intentionally concealing the nature of their activities from the authorities and the owner of the farm, of using unsafe and improper methods of disposing of both solid and liquid hazardous wastes, and of failing to warn the farm's owner and his neighbors of the future hazard posed by the illegal dumping." *Id.* On reviewing a motion for summary judgment for defendant, the court held that "plaintiffs' complaint sufficiently alleges a cause of action under section 9607 of CERCLA for liability for response costs and under section 6973 of RCRA for abatement of an imminent hazard." *Id.* at 1437.

52. *See Jones*, 584 F. Supp. at 1428 (explaining language "any other person" creates implied right to contribution). Although *Jones* was a suit by private landowners, not at all responsible for contamination by adjacent property, the court allowed their suit for declarative and injunctive relief. *See id.* at 1426, 1428; *see also United States v. Kramer*, 757 F. Supp. 397, 416 (D.N.J. 1991) (finding "[s]ection 107 permits the Government or a private party to go in, clean up the mess, pay the bill, then collect all its costs not inconsistent with the NCP [National Contingency Plan] from other responsible parties . . ."); *City of Philadelphia v. Stephan Chem. Co.*, 544 F. Supp. 1135, 1142 (E.D. Pa. 1982) (holding "any other person" also includes party itself liable under CERCLA).

action for contribution was applicable in situations where potentially responsible parties were subject to joint and several liability and "incurred response costs in excess of their pro rata share."⁵³

B. SARA

In 1986, Congress codified this right to contribution in SARA, which provides an express right to contribution for potentially responsible parties following a civil action under section 107(a).⁵⁴ The right to contribution changed in four significant ways with the section 113 express provision, which potentially responsible parties opposed.⁵⁵

Most importantly, SARA limited the liability of defendants to several, as opposed to joint and several.⁵⁶ This change makes the process of reimbursement more difficult and expensive.⁵⁷ Contri-

53. *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1404 (9th Cir. 1997). The rationale for this right is to "alleviate the potentially unfair burden that joint and several liability may cause." *Id.*

54. See CERCLA § 113(f), 42 U.S.C. § 9613(f). For the language of the statute as amended, see *supra* note 5. See also *United States v. Akzo Coatings, Inc.*, 949 F.2d 1409, 1417 (6th Cir. 1991) (explaining legislative purpose of SARA was "to better define cleanup standards, to expand resources available to EPA for investigations and cleanups, to clarify EPA's authority under Superfund law, and to expand and clarify the states' role in any remedial action undertaken, or ordered, by EPA").

55. See, e.g., *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997) (rejecting plaintiffs' argument that PRPs can choose between section 107 and 113). For a discussion of the controversy which arose as a result of SARA, see *supra* notes 4 & 6 and accompanying text.

56. See *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997) ("[section] 113 contribution action is not a 'cost-recovery' action under [section] 107 as that action has been defined, because it does not impose strict, joint and several liability on the defendant PRPs . . . [and] is governed by the equitable apportionment principles established in [section] 113(f).").

Furthermore, section 113(f) does not add to recovery or "in itself create any new liabilities; rather it confirms the right of a potentially responsible person under section 107 to obtain contribution from other potentially responsible persons." *New Castle County*, 111 F.3d at 1122 (quoting *Bancamerica Commercial Corp. v. Mosher Steel, Inc.*, 100 F.3d 792, 800 (10th Cir. 1996)).

For a discussion of the distinction between a section 107(a) action, joint and several liability, and contribution, see *supra* notes 3 & 8 and accompanying text.

57. See *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1515 (10th Cir. 1991) (explaining that "[c]ontribution is a statutory or common law right available to those who have paid more than their equitable share of a common liability"); *Huggins v. Graves*, 337 F.2d 486, 489 (6th Cir. 1964) (stating contribution is fundamentally different than joint and several liability because it is based on "a common obligation . . . and one party shall not be subject to bear more than his just share to the advantage of his co-obligor").

According to some courts, the limitations on an action for contribution are consistent with CERCLA goals:

If . . . a potentially responsible person found liable under section 107 could bring a section 107 action against another potentially responsible

bution is fundamentally different than joint and several liability because it is based on "a common obligation . . . and one party shall not be subject to bear more than his just share to the advantage of his co-obligor."⁵⁸

SARA also reduces the statute of limitations for contribution claims from six to three years.⁵⁹ This change is significant because CERCLA, when originally enacted, did not provide a statute of limitations for section 107(a) actions.⁶⁰ In addition, the contribution

person . . . [it] could recoup all of its expenditures regardless of fault. This strains logic. "[I]t is sensible to assume that Congress intended only innocent parties — not parties who were themselves liable—to be permitted to recoup the whole of their expenditures."

New Castle County, 111 F.3d at 1121 (quoting *United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994)).

58. *Huggins*, 337 F.2d at 489; see *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997) (holding, with respect to contribution, that plaintiff is liable only for its share of contamination and can hold other PRPs liable based on their share of contamination); *Akzo Coatings Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994) (defining contribution as claim "by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make"); *New Castle County*, 111 F.3d at 1122 n.6 (3d Cir. 1997) (recognizing that only defense to joint and several liability is section 113 contribution); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1513 (11th Cir. 1996) (permitting parties proceeding under section 113 to allocate liability).

59. See *United Tech. Corp.*, 33 F.3d at 98. The court explained that "cost recovery actions are subject to a six-year statute of limitations . . . while contribution actions must be brought within half that time." *Id.*

In *United Technical Corp. v. Browning-Ferris Indus., Inc.*, the First Circuit held that this difference fits within the legislative goals of CERCLA:

[T]he two statutes of limitations complement each other and together exhaust the types of actions that might be brought to recoup response costs: the shorter prescriptive period, contained in 42 U.S.C. § 9613(g)(3), governs actions brought by liable parties during or following a civil action under 42 U.S.C. §§ 9606-9607(a), while the longer statute of limitations, contained in 42 U.S.C. § 9613(g)(2), addresses actions brought by innocent parties that have undertaken cleanups (say, the federal, state or local government).

Id. at 99.

The statutes of limitations for both reimbursement actions are set forth in section 113. See *id.* The statute provides:

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced— . . .

(B) for a remedial action, within 6 years after initiation of physical on-site construction

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment . . .

(B) the date of an administrative order

CERCLA § 113(g), 42 U.S.C. § 9613(g).

60. See *Velsicol Chem. Corp. v. Enenco, Inc.*, 9 F.3d 524, 528 (6th Cir. 1993) (recognizing section 113(f) established statutes of limitations for both reimburse-

provision shifts the burden of demonstrating defendants' liability to the plaintiff.⁶¹ Furthermore, the provision contains a settlement provision prohibiting potentially responsible party suits for contribution against those who settle with the government.⁶²

Enacted to clarify recovery by potentially responsible parties, the new section 113(f) operated in reality to generate great confusion regarding the rights and limitations of responsible parties.⁶³ In addressing this issue, the District Court for the District of Oregon pointed out in *Boeing Co. v. Cascade Corp.*,⁶⁴ that a section 113 action does not eliminate prior case law because the courts require the defendant to satisfy the four part test determining liability under section 107(a) as a prerequisite to bringing a contribution action.⁶⁵

ment actions under CERCLA because original CERCLA did not provide section 107(a) statute of limitations).

61. See *United States v. Taylor*, 909 F. Supp. 355, 365 (M.D.N.C. 1995) (explaining that in contribution action PRP has burden of establishing liability).

62. See CERCLA § 113(f) (2), 42 U.S.C. § 9613(f) (2). The statute provides:
(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

Id.; see also *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1537 (10th Cir. 1995) (noting that "PRP who has entered into a judicially approved settlement with the United States may not be held liable for contribution to another PRP if the contribution claim concerns matters addressed in the settlement").

63. See Ann Alexander, *Standing Under Superfund §§ 107 and 113; Avoiding the Error of the Blind Man and the Elephant*, TOXICS L. RPTR. (BNA) 155 (July 12, 1995) (noting SARA "ignited a firestorm" of confusion).

64. 920 F. Supp. 1121 (D. Or. 1996).

65. See *Boeing Co.*, 920 F. Supp. at 1132. The district court determined PRP liability of a defendant company in a suit for contribution by a contributing PRP. See *id.* at 1142. The *Boeing Co.* court ultimately determined:

(1) defendant was responsible for pro rata share of response costs incurred by plaintiff; (2) plaintiff adequately accounted for costs incurred for response actions to satisfy requirements of National Contingency Plan (NCP); (3) plaintiff adequately provided information and adequately investigated contamination to satisfy NCP; (4) respective harm to environment caused by parties, for purposes of cost allocation, was best reflected by mass of contaminants which each party contributed to contamination plume; (5) revision of mass analysis allocation so as to allocate greater responsibility to plaintiff was appropriate in light of contaminant flow analysis; (6) funds received by plaintiff through settlement with previous owners and operators of site had to be factored into allocation of response costs; and (7) plaintiff was entitled to declaratory judgment allocating responsibility for future costs, which would be same as that for past costs.

Id. at 1121.

Once a plaintiff successfully establishes the liability of a defendant, the court will allocate a portion of the response costs.⁶⁶ That is, once a defendant is found liable under section 107(a), the court moves to allocation, "a contribution claim controlled by 42 U.S.C. [section] 9613(f)."⁶⁷ In making this determination, courts will consider all facts relevant to determining equitable distribution of costs.⁶⁸ Many courts utilize the "Gore factors;" these factors purport to exemplify the purpose and determination of equitable allocation.⁶⁹

The rationale for this demonstration of liability is provided in the statute: "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a)" CERCLA § 113(f), 42 U.S.C. § 9613(f).

66. See *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995). The Eighth Circuit determined that "[o]nce liability is established, the focus shifts to allocation. Here, the question is, what portion of the plaintiff's response costs will the defendant be responsible for?" *Id.*

As the Third Circuit has explained, allocation is effective in reaching the goal of SARA: "while a potentially responsible person should not be permitted to recover all of its costs from another potentially responsible person, the person should be able to recoup that portion of its expenditures which exceeds its fair share of the overall liability." *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1122 (3d Cir. 1997). Furthermore, allocation is equitable, requiring a court to "make its own factual findings and legal conclusions." *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935, 938 (8th Cir. 1995) (explaining party will be allocated share of response costs depending on its demonstration of harm, including amount and toxicity); see, e.g., *Boeing Co.*, 920 F. Supp. at 1142 (utilizing allocation to find parties liable based on 30/70 percent basis).

Allocation, however, is fundamentally different from divisibility:

While the "divisibility" defense to joint and several liability is frequently invoked in cost recovery actions brought under § 107(a), it is not a defense to a contribution action under § 113(f). In contrast to a § 107(a) action, a contribution claim under § 113(f) is a means of equitably allocating response costs among responsible or potentially responsible parties.

Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1513 (11th Cir. 1996).

67. *Control Data Corp.*, 53 F.3d at 935.

68. See *id.* Courts consider various factors in determining the proper allocation of costs in contribution claims. See *id.* Courts are not limited in what factors they utilize, because "[i]n any given case, 'a court may consider several factors, a few factors, or only one determining factor, . . . depending on the totality of the circumstances presented to the court.'" *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995) (quoting *Environmental Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992)).

69. See *Boeing*, 920 F. Supp. at 1132. The Gore factors, named for a sponsor of CERCLA are:

- 1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished;
- 2) the amount of hazardous waste involved;
- 3) the degree of toxicity of the hazardous waste;
- 4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- 5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of

In addition, as a result of the changes to the right of contribution through section 113, potentially responsible parties continue to bring suit under section 107(a), forcing courts to interpret the correct reimbursement process under as amended CERCLA.⁷⁰ Potentially responsible parties argue that section 107(a)'s language does not exclude joint and several recovery by responsible parties because the language provides an avenue for cost recovery "by any other party," and does not specify innocent parties.⁷¹ A majority of courts addressing the issue explicitly reject this argument, maintaining that "any claim that would reapportion costs between these parties is the quintessential claim for contribution."⁷² In addition to

such hazardous waste; and 6) the degree of cooperation by the parties with Federal, state or local officials to prevent any harm to the public health or the environment.

Id. (quoting H.R. REP. NO. 99-253, pt. 3, at 20 (1986), *reprinted in* 1986 U.S.C.A.N. 2835, 3042); *see* John Copeland Nagle, *CERCLA, Causation and Responsibility*, 78 MINN. L. REV. 1493, 1522-23, n.135 (1994) (stating Gore factors most widely utilized factors by courts).

70. *See* Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496 (11th Cir. 1996) (noting potentially responsible party brought suit against other responsible parties under both section 107(a) and section 113(f)); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997) (discussing suit brought under sections 107(a) and 113(f)); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994) (analyzing suit brought under sections 107(a) and 113(f)); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668, 672-73 (5th Cir. 1989) (dismissing suit for contribution when brought under both sections 107(a) and 113(f)).

71. CERCLA § 107(a), 42 U.S.C. § 9607(a). The First Circuit describes the argument that many PRPs utilize in an attempt to bring suit under section 107(a), thereby eliminating the unfavorable consequences of a section 113(f) action: "[a]ppellants argue that, notwithstanding section 9613(f)(3), the broad, unqualified language to the effect that responsible parties shall be liable to 'any other person,' 42 U.S.C. [section] 9607(a)(4), provides an alternative avenue for the maintainances of their suit." *United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 101 (1st Cir. 1994). In other words, "section 107 states that responsible parties shall be liable to 'any other person' . . . [and] the court should not limit section 107 'person[s]' to innocent parties." *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1122 (3d Cir. 1997). The Court of Appeals for the First Circuit rejected this argument. *See id.* at 1123.

This argument has been rejected by many courts, including the Third Circuit in *New Castle County*, which found that allowing a PRP to choose between the two provisions "would render section 113 a nullity. Potentially responsible persons would quickly abandon section 113 in favor of the substantially more generous provisions of section 107." *Id.* at 1123; *see also Colorado & E. R.R. Co.*, 50 F.3d at 1536 (supporting conclusion similar to Third Circuit, limiting PRP to section 113 contribution action); *United Tech. Corp.*, 33 F.3d at 101 (holding PRP choice between sections 107(a) and 113(f) is inconsistent with CERCLA goals).

72. *Colorado & E. R.R. Co.*, 50 F.3d at 1536; *see Pinal Creek Group*, 118 F.3d at 1301 (finding PRPs limited to contribution claim under flush language of section 107); *New Castle County*, 111 F.3d at 1126 (concluding CERCLA cost recovery action may only be brought by innocent parties that have undertaken clean-ups); *Boeing Co. v. Cascade Corp.*, 920 F. Supp. 1121, 1141 (D. Or. 1996) (limiting cost recovery availability to innocent parties); *Redwing Carriers, Inc. v. Saraland Apart-*

the statutory construction arguments, these courts find this conclusion to be consistent with CERCLA's goals.⁷³

Other courts, however, have permitted potentially responsible parties to pursue section 107 cost recovery actions.⁷⁴ The rationale for this minority position is that cost recovery actions expedite CER-

ments, 94 F.3d 1489, 1514 (11th Cir. 1996) (finding PRP precluded from pursuing cost recovery action); *United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 106 (1st Cir. 1994) (relegating PRP to contribution, finding cost recovery available only to innocent party); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 773-74 (7th Cir. 1994) (preventing PRP from recovery under section 107(a)).

73. See *Colorado & E. R.R. Co.*, 50 F.3d at 1536 (prohibiting responsible parties from seeking recovery under section 107(a) and recognizing that if PRP plaintiff was "allowed to recover expenditures incurred in cleanup and remediation from other PRPs under § 107's strict liability scheme, [section] 113(f) would be rendered meaningless"); *Pinal Creek Group*, 118 F.3d at 1304 (limiting PRP liability to contribution, court rejected argument "that the policy of promoting rapid voluntary cleanups would be undermined to any significant degree [C]ourts may take into account the degree of cooperation shown by a PRP when equitably allocating liability among PRPs under [section] 113(f)(1)"). For a discussion of the policy and rationale of CERCLA, see *supra* note 2 and accompanying text.

74. See *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 840 (4th Cir. 1992) (allowing potentially responsible owner of contaminated property to recover under section 107 for cleanup costs); *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.*, 901 F.3d 1206, 1207 (4th Cir. 1990) (permitting potentially liable waste disposal operator to proceed under section 107); *Town of Wallkill v. Tesa Tape Inc.*, 891 F. Supp. 955, 957, 961 (S.D.N.Y. 1995) (concluding town, liable under CERCLA due to municipal landfill, may proceed under section 107(a) following further factual determination of liability); *Companies for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575, 577 (D. Conn. 1994) (allowing PRP to pursue section 107 cost recovery action); *United States v. SCA Serv., Inc.*, 865 F. Supp. 533, 543 (N.D. Ind. 1994) (finding PRP not limited to section 113(f) action for contribution); *City of N. Miami v. Berger*, 828 F. Supp. 401, 404 (E.D. Va. 1993) (allowing PRP to proceed under either section 107(a) or 113(f)); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1271 (E.D. Va. 1992) (rejecting majority, permits PRP recovery under cost recovery provision); *FMC Corp. v. United States Dept. of Commerce*, 786 F. Supp. 471, 487 (E.D. Pa. 1992) (declining to limit PRPs to action for contribution); *United States v. Jagiella*, No. 87 C 1406, 1991 WL 78171, at *1 (N.D. Ill. May 2, 1991) (allowing PRP to pursue section 107 cost recovery action); *Kelley v. Thomas Solvent Co.*, 790 F. Supp. 710, 719 (W.D. Mich. 1990) (finding majority rule, forcing PRP to pursue section 113(f) contribution suit, inconsistent with CERCLA); *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 916 (N.D. Okl. 1987) (permitting PRP to choose action under either cost recovery or contribution provisions); see also *Adhesives Research Inc. v. American Inks & Coatings Corp.*, 931 F. Supp. 1231, 1232 (M.D. Pa. 1996) (permitting PRP who had already settled with EPA to pursue cost recovery under section 107).

The District Court for the Middle District of Pennsylvania follows the minority view, while noting the similarities in the cases and difficulty in justifying the two different holdings:

The facts of the aforementioned cases are not significantly different from those of cases where a minority of courts have reached opposite results. The contradictory outcomes appear to derive more from two differing interpretations of CERCLA, its policy goals, and the proper means of effectuating those goals, than from factual distinctions in the cases [T]he court finds the position taken by the minority of courts to address

CLA's goals by encouraging quick cleanup.⁷⁵ In *United States v. Taylor*,⁷⁶ the District Court for the Middle District of North Carolina took a slightly different approach: "the test as to whether a private party may utilize Section 107 does not rest on whether that party is liable, or potentially liable. Rather, it depends on whether such party has incurred 'necessary costs of response.'"⁷⁷ Thus, according to the minority approach, as long as a plaintiff has sufficiently incurred response costs, it may pursue a section 107 cost recovery action.⁷⁸

The relative silence of the Supreme Court further contributes to the confusion regarding the proper interpretation of CERCLA; the Court's only opinion regarding these provisions, *Key Tronic Corp. v. United States*,⁷⁹ addressed the narrow issue of whether response costs as defined in the statute may include attorneys fees, and did not provide lower courts with a definite resolution on the

the issue to comport with the plain language of CERCLA, and to best serve the policy goals of the statute.

Id. at 1241. Ultimately, the *Adhesives Research* court based its decision on the lack of the word innocent in section 107(a), finding "that the 'any other person' language in [section] 107 means 'any other person' regardless of that person's CERCLA culpability." *Id.* at 1246.

75. See *Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, No. Civ. A. 94-0752, 1996 WL 557592, at *225 (E.D. Pa. Oct. 1, 1996) (explaining quick and efficient remedy of hazardous pollution chief goal of CERCLA); see also *Adhesives Research*, 931 F. Supp. at 1246 (holding that "[s]uch an interpretation and application of CERCLA merely assists in accomplishing CERCLA's goals by providing all parties with a strong incentive to put the environment first").

76. 909 F. Supp. 355 (M.D.N.C. 1995). *Taylor* involved claims by a third-party against co-defendants after the original claim against co-defendants was dismissed. See *id.* The CERCLA claims involved the "environmental cleanup [by the United States] of a Super Fund site known as the 'Aberdeen Pesticide Site.'" *Id.* at 357.

77. *Taylor*, 909 F. Supp. at 362-63 (citing CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607 (a)(4)(B)) (footnotes omitted). The District Court for the Middle District of North Carolina found the approach of limiting potentially responsible parties to actions for contribution fundamentally flawed:

First, it ignores the plain language of the statute. Second, this construction requires that the courts engraft the word 'innocent' into Section 107(a)(4)(B), so as to permit other 'innocent' parties to recoup their recovery costs. However, this would require a party to prove its innocence before utilizing Section 107, an extraordinary burden to place on a plaintiff.

Id. at 363; see also *United States v. Kramer*, 757 F. Supp. 397, 414 (D.N.J. 1991) (supporting *Taylor* position by pointing out that since government may be PRP, under majority approach it would be prohibited from bringing section 107 action, a contrary conclusion).

78. See *Taylor*, 909 F. Supp. at 363. Response costs are slightly different under this approach, though, as "a party does not incur response costs merely by being adjudged liable, or by being a defendant in a cost-recovery action. Rather, a party must, in some degree, actually conduct the cleanup." *Id.* For a discussion of response costs, see *supra* note 43 and accompanying text.

79. 511 U.S. 809 (1994).

availability of cost recovery actions for potentially responsible parties.⁸⁰ The failure of the Supreme Court to directly address this issue has created confusion in lower courts.⁸¹

Although the Supreme Court did not specifically address whether a potentially responsible party may pursue a section 107(a) cost recovery action, the language of the Court can, and has, been interpreted in this manner.⁸² The *Key Tronic* court reiterated three important principles which, taken together, may imply the right of potentially responsible parties to pursue section 107(a) cost recovery actions.⁸³

80. *See id.* The precise issue addressed in *Key Tronic*, 511 U.S. was "whether attorneys fees are 'necessary costs of response' within the meaning of [section] 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) . . . and therefore recoverable in such an action." *Id.* at 811 (citation omitted). The Court held that "CERCLA [section] 107 does not provide for the award of private litigants' attorney's fees associated with bringing a cost recovery action." *Id.* at 809. *Key Tronic* involved the contamination of a water supply by disposal of hazardous liquids by Key Tronic and various other parties, including the United States Air Force. *See id.* Specifically, plaintiffs sought attorneys fees incurred in litigating the action. *See id.*

81. *See id.* The confusion from this decision stems from two of the Court's conclusions. First, the Supreme Court stated that CERCLA "now expressly authorizes a cause of action for contribution in [section] 113 and impliedly authorizes a similar and somewhat overlapping remedy in [section] 107." *Id.* at 816. Second, the Court stated that "some lawyers' work that is closely tied to the actual cleanup may constitute a necessary cost of response in and of itself under the terms of [section] 107(a)(4)(B). The component of Key Tronic's claim that covers the work performed in identifying other PRP's fall in this category." *Id.* at 820.

See, e.g., Adhesives Research Inc. v. American Inks & Coatings Corp., 931 F. Supp. 1231, 1246 (M.D. Pa. 1996) (stating its decision to permit cost recovery actions by PRPs is consistent with *Key Tronic*, noting, however, this support is limited because *Key Tronic* Court did not directly address section 107 standing). *But see* Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1303 (9th Cir. 1997) (finding decision to limit PRP actions to contribution consistent with *Key Tronic* because Supreme Court implied "that claim by a PRP under [section] 107 would be 'for contribution against those treated as joint tortfeasors.'" (quoting *Key Tronic*, 511 U.S. at 818 n.11).

82. *See Key Tronic*, 511 U.S. at 816, 818, 820.

83. *See id.* at 816. In resolving the issue of recovering attorneys fees under CERCLA, the Supreme Court began with an examination of the legislation as originally enacted and the effect of SARA. *See id.* For a discussion of the legislative history of CERCLA and SARA, see *supra* notes 2 & 4 & 5 and accompanying text.

The Court found sections 107 and 113 overlapping because, from its reading of the statute, section 113 did not negate the judicially implied right to seek retribution under section 107:

Other SARA provisions, moreover, appeared to endorse the judicial decisions recognizing a cause of action under § 107 by presupposing that such an action existed. An amendment to § 107 itself, for example, refers to 'amounts recoverable in an action under this section.' 42 U.S.C. § 9607 (a)(4)(D). The new contribution section also contains a reference to a 'civil action . . . under section 107(a).' 42 U.S.C. § 9613(f)(1). Thus the statute now expressly authorizes a cause of action for contribu-

First, the Court interpreted the SARA amended statute to “expressly authorize[] a cause of action for contribution in [section] 113 and *impliedly authorize[] a similar and somewhat overlapping remedy in [section] 107.*”⁸⁴ Second, and most important, the decision stated that *implied actions under section 107 are not prohibited by section 113* and, therefore, continue to exist: section 107 “impliedly authorizes private parties to recover cleanup costs from other potentially responsible parties.”⁸⁵ Third, the Supreme Court reversed the decision of the appellate court, in part, to exclude the award of attorneys fees for prosecution, permitting the plaintiff, a responsible party, to recover other costs under section 107.⁸⁶

To limit responsible parties to section 113(f) contribution claims, courts have attempted to distinguish *Key Tronic*.⁸⁷ Other courts facing the issue have omitted any discussion of *Key Tronic*, avoiding the difficulty of maintaining the majority opinion in light of the Supreme Court’s holding.⁸⁸

tion in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.

Id. at 816.

Most importantly, the Supreme Court held that section 113 did not negate the judicially implied right to seek retribution under section 107. *See id.* at 818.

84. *Id.* at 818; *see Centerior*, 153 F.3d at 350 (finding section 107(a) actions available to innocent parties incurring response costs); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1428 (S.D. Ohio 1984) (allowing innocent adjacent property owners to proceed against landfill owners under section 107(a)); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) (holding section 107(a) available for innocent parties).

85. *Key Tronic*, 511 U.S. at 818 (emphasis added). Plaintiffs sought attorneys fees for: “(1) the identification of other potentially responsible parties (PRPs), . . . (2) preparation and negotiation of its agreement with the EPA; and (3) the prosecution of this litigation.” *Id.* at 812. The Supreme Court limited plaintiffs’ recovery to the second, finding:

These efforts might well be performed by engineers, chemists, private investigators or other professionals who are not lawyers Tracking down other responsible solvent polluters increases the probability that a cleanup will be effective and get paid for. *Key Tronic* is therefore quite right to claim that such efforts significantly benefited [sic] the entire cleanup effort and served a statutory purpose apart from the reallocation of costs. These kind of activities are recoverable costs of response clearly distinguishable from litigation expenses.

Id. at 820.

86. *Id.* at 818; *see also Adhesives Research Inc. v. American Inks & Coatings Corp.*, 931 F. Supp. 1231, 1238 (M.D. Pa. 1996) (finding “any person who incurs response costs, regardless of that person’s potential or actual liability” may recover under section 107(a)).

87. *See, e.g., Sun Co. v. Browning-Ferris Inc.*, 124 F.3d 1187, 1193 (10th Cir. 1997) (utilizing *Key Tronic* only to establish rights of recovery, but no attempt to distinguish holding).

88. *See, e.g., New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1119 (3d Cir. 1997) (declining to discuss *Key Tronic*); *Boeing Co. v. Cascade Corp.*,

Thus, the Sixth Circuit was bound by the *Key Tronic* precedent, as well as its earlier decision in *Velsicol Chemical Corp. v. Enerco, Inc.*⁸⁹ The issue presented in *Velsicol* was whether SARA statute of limitations should be applied retroactively.⁹⁰ This decision did not specifically address whether a potentially responsible party may pursue a section 107 cost recovery claim, but in maintaining that the statute of limitations does not apply retroactively, the Sixth Circuit in *Velsicol* instructed the district court to reinstate a cost recovery claim by a potentially responsible party.⁹¹

IV. NARRATIVE ANALYSIS

In *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, the Sixth Circuit examined the proper interpretation of CERCLA.⁹² The *Centerior* court discussed a fundamental issue on appeal: whether the district court properly found that plaintiffs' action for reimbursement of hazardous waste cleanup costs necessarily constitutes an action for contribution under the statute.⁹³ The Sixth Circuit

920 F. Supp. 1121, 1125 (D. Or. 1996) (limiting responsible party to section 113(f) claim, omitting any reference to *Key Tronic*).

89. 9 F.3d 524 (6th Cir. 1994).

90. See *id.* at 527. The Sixth Circuit permitted cost recovery and contribution claims by a potentially responsible city and chemical corporation, finding the "statute of limitations for a response cost recovery claim under CERCLA [section] 107, enacted as part of SARA in 1986, should [not] be retroactively applied to an accrued-but-not-yet filed claim . . ." *Id.* at 526.

91. See *id.* at 529-30. The Sixth Circuit stated that "absent a specific congressional intent to the contrary, we will broadly interpret the CERCLA provisions in accordance with CERCLA's statutory goals of facilitating expeditious cleanups of inactive and abandoned hazardous waste sites and holding the responsible parties liable for the cleanups." *Id.* at 529. Moreover, while not directly addressing suit availability, the *Velsicol* court stated, "*Velsicol* [PRP] had, at the very least, *three years* from the effective date of statute of limitations . . . to file its cost-recovery claim." *Id.* at 529-30 (emphasis added).

92. See *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 346 (6th Cir. 1998). For the holdings of courts of appeals addressing the same issue, see *supra* note 13.

93. See *id.* at 347. The district court maintained that all PRPs' reimbursement claims are necessarily for contribution, and "all of the plaintiffs' original complaints pleading joint and several cost recovery actions under [section] 107(a) would be construed as asserting a contribution claim under [section] 113(f)." *Id.* On appeal, the defendants supported this conclusion, emphasizing the need to read CERCLA's reimbursement provisions together: "[since section] 113(f) is incorporated under [section] 107, [and] then a [section] 113(f) action is an action to recover the necessary costs of response by any other person, as referred to in [section] 107. The action only happens to be an action for contribution." *Id.* at 350.

The plaintiffs refuted this conclusion, advocating a test whereby "joint and several cost recovery under CERCLA does not rest on whether a party is liable or potentially liable, but rather depends only on whether a party has incurred neces-

answered in the affirmative, concluding that a potentially responsible party under CERCLA is necessarily limited to an action for contribution.⁹⁴

The Sixth Circuit began its discussion with an examination of the statute itself, as well as the statute's history.⁹⁵ The *Centrior* court noted at the outset that many courts have considered this issue since the 1986 enactment of SARA.⁹⁶ Then, in order to fully understand the significance of the change in legislation, the Sixth Circuit defined contribution.⁹⁷ Recognizing that plaintiffs' suit fits within the meaning of an action for contribution, the *Centrior* court concluded, without discussion, that plaintiffs are necessarily limited to a section 113(f) action and are precluded from asserting a section 107(a) cost recovery action which would provide joint and several liability.⁹⁸

sary costs of response." *Id.* at 349-50; see *United States v. Taylor*, 909 F. Supp. 355, 362-63 (M.D.N.C. 1995) (utilizing minority position in determining PRP liability).

94. See *Centrior*, 153 F.3d at 355 (limiting PRPs to action for contribution).

95. See *id.* at 345-47. For the text of the applicable sections of CERCLA, see *supra* notes 5 & 34 and accompanying text. For a discussion of the rationale for CERCLA's enactment, see *supra* notes 2 & 4 and accompanying text.

96. See *id.* at 349. For a discussion of the 1986 enactment of SARA, see *supra* notes 54-91 and accompanying text.

97. See *id.* at 350-51. The Sixth Circuit recognized that adequate resolution of this issue required an interpretation of the legislation as amended by SARA, because "[w]hether [a] party may seek joint and several cost recovery, or is limited to an action for contribution governed by [section] 113(f), however, depends on the nature of the cause of action pleaded." *Id.* at 350. Relying on Black's Law Dictionary, the Sixth Circuit defined "contribution as 'the [r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear.'" *Id.* (quoting BLACK'S LAW DICTIONARY 328 (6th ed. 1990)); see also *United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 99 (1st Cir. 1994). The First Circuit defined contribution in an environmental context, holding that it "refers to an action by a responsible party to recover from another responsible party that portion of its costs that are in excess of its *pro rata* share of the aggregate response costs including both first-instance costs and reimbursed costs." *Id.* at 103.

98. See *Centrior*, 153 F.3d at 351, 356. The facts of this case - that plaintiffs: 1) are PRPs; 2) have no defenses available under § 107(b); 3) received an administrative order to commence cleanup; and 4) incurred more costs than liable for - indicate a fundamental claim for contribution. See *id.*

In *Akzo Coatings, Inc. v. Aigner Corp.*, the Seventh Circuit examined similar factors: "Akzo itself is a party liable in some measure for the contamination at the Fisher-Calo site, and the gist of Akzo's claim is that the costs it has incurred should be apportioned equitably amongst itself and the others responsible . . . That is a quintessential claim for contribution." 30 F.3d 761, 764 (7th Cir. 1994). *Akzo Coatings, Inc.* involved an action for contribution for costs incurred by plaintiff "for the initial clean-up work it had performed at the behest of the EPA as well as the voluntary costs it had incurred in studying the long term clean-up of the site with other PRPs." *Id.* at 763. In limiting the potentially responsible plaintiff to contribution, the Seventh Circuit utilized the Restatement and the Fifth Circuit's decision in *Amoco Oil Co. v. Borden, Inc.*, to hold that plaintiff's claim "remains one by

The Sixth Circuit next responded to the plaintiffs' contention that they are not limited to an action for contribution because they are distinguishable from plaintiffs in similar cases.⁹⁹ Plaintiffs distinguished their case based on two factors: first, they have not entered into a settlement or been adjudged liable by EPA;¹⁰⁰ and second, an action for contribution requires a prior adjudication of liability.¹⁰¹

Beginning its determination of whether plaintiffs must be adjudged liable before instituting an action for contribution, the *Centerior* court examined its previous references to contribution, concluding that "none of the definitions set forth above referred to any such requirement."¹⁰² Instead, the Sixth Circuit requires only

and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make." *Akzo Coatings, Inc.*, 30 F.3d at 764 (citing *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989)). For the Fifth Circuit's holding and rationale, see *supra* notes 40 & 70 and accompanying text. For the text of the relevant RESTATEMENT (SECOND) OF TORTS (1965) provision, section 433A, see *supra* note 38 and accompanying text.

99. See *Centerior*, 153 F.3d at 351.

100. See *id.* (charging no adjudication, thus cost recovery action available); see, e.g., *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1119-20 (3d Cir. 1997) (holding previous action by EPA limits PRPs to contribution); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1533 (10th Cir. 1995) (finding PRP may not pursue cost recovery action following EPA adjudication); *United Tech. Corp.*, 33 F.3d at 97 (limiting PRPs to contribution action after plaintiffs had previously been sued by EPA in district court, resulting in consent decree directing remedial action).

101. See *Centerior*, 153 F.3d at 351. Plaintiffs "contend that contribution exists only when a party has either been 'adjudged' liable or settled a common liability." *Id.*

102. *Id.* Following its previous references, the Sixth Circuit stated that an action for contribution exists when "a plaintiff act[s] under some compulsion or legal obligation to an injured party when he or she discharged the payment." *Id.* The Sixth Circuit examined *Huggins v. Graves*, an earlier Sixth Circuit case involving a right to contribution at common law in a medical malpractice suit, which specifically concluded:

Although the legal obligation on the part of each obligor must actually exist . . . [i]f a judgment has not been rendered, the validity of the claim against both of the parties can be determined by the Court in the action seeking contribution. The basic question is whether the parties are actually legally obligated, not whether obligation has been reduced to a judgment.

Huggins v. Graves, 337 F.2d 486, 489 (6th Cir. 1964).

Other courts have followed the *Huggins* view, finding a prior judgment of liability is unnecessary. See *Zontelli Bros. v. Northern P. Ry. Corp.*, 263 F.2d 194, 199 (8th Cir. 1959) (determining contribution action may proceed, regardless of prior adjudication); *Chamberlain v. McCleary*, 217 F. Supp. 591, 597 (E.D. Tenn. 1963) (holding prior judgment not necessary); *McLochlin v. Miller*, 217 N.E.2d 50, 53 (Ind. Ct. App. 1966) (finding court may determine legal obligation without prior judgment).

that the plaintiff have acted out of a legal or moral duty.¹⁰³ Furthermore, the Sixth Circuit pointed out that the statute provides explicitly for a contribution action following an administrative order which indicates no formal adjudication is necessary.¹⁰⁴

The Sixth Circuit supported this conclusion through an examination of the legislative history of CERCLA, finding that reading sections 107(a) and 113(f) together is fully consistent with CERCLA's goals.¹⁰⁵ The fact that SARA was enacted to clarify the right to an action for contribution, which was previously judicially implied, indicates that a "right to contribution has always been established pursuant to [section] 107, yet only after the codification of [section] 113(f) was the right made explicit."¹⁰⁶ The *Centerior* court, therefore, reasoned that the explicit provision does not add further requirements.¹⁰⁷ The Sixth Circuit found that decisions

103. See *Centerior*, 153 F.3d at 351 (noting adjudication unnecessary so long as plaintiff "act[s] under some compulsion or legal obligation to an injured party").

104. See *id.* The Sixth Circuit explained section 106 administrative orders:

The EPA issues a [section] 106 order when it finds an "imminent and substantial endangerment to the public health or welfare or environment" due to site contamination If a party fails to comply with a [section] 106 order it faces penalties of up to \$25,000 per day and damages in an amount up to three times the cleanup costs.

Id. at 346 n.4 (citation omitted) (quoting CERCLA § 106(a), 42 U.S.C. § 9606(a)). For cases utilizing CERCLA administrative orders and an explanation of their rationale, see *supra* note 25 and accompanying text.

105. See *id.* at 352. The Sixth Circuit believed this legislative history supported its position by requiring that "[section] 113(f) and [section] 107 work together." *Id.* The *Centerior* district court found that reading these provisions together is consistent with the purpose of CERCLA:

Congress's intent [is] that Superfund sites be cleaned up expeditiously and fairly. Section 113(f) (2) has been aptly described as creating a carrot and stick. "The carrot the EPA can offer potential settlers is that they need no longer fear that a later contribution action by a non-settlor will compel them to pay still more money to extinguish their liability. . . . As for the stick, if the settlor pays less than its proportionate share of liability, the non-settlers, being jointly and severally liable, must make good the difference."

United States v. ASARCO, Inc., 814 F. Supp. 951, 956-57 (D. Colo. 1993) (quoting *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1027 (D. Mass. 1989)). For a discussion of SARA's legislative history, see *supra* note 4.

106. *Centerior*, 153 F.3d at 352. In an attempt to support this conclusion, the Sixth Circuit pointed to language in the legislative history of SARA, which "emphasized that the provision 'clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties.'" *Id.* at 352 (quoting S. REP. NO. 99-11, at 44 (1985)); see *ASARCO, Inc.*, 814 F. Supp. at 956 (reading two provisions of CERCLA together such that "[u]nder CERCLA's scheme, section 107 governs liability, while section 113(f) creates a mechanism for apportioning that liability among responsible parties").

107. *Centerior*, 153 F.3d at 352. The Sixth Circuit pointed to the language finding "[section] 113(f) did not create a new cause of action, nor did it create

from the Ninth and Tenth Circuits supported its position.¹⁰⁸ The Sixth Circuit also found this conclusion consistent with its previous holdings and the Supreme Court decisions regarding CERCLA following the enactment of SARA.¹⁰⁹

The *Centerior* court maintained that forcing the plaintiffs to pursue the more limited, costly action for contribution is not only fully consistent with CERCLA's goals, but is actually the remedy under plaintiffs' desired system.¹¹⁰ Although section 107(a) cost re-

new liability" *Id.* (citing *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997)).

108. See *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1306 (9th Cir. 1997) (prohibiting potentially responsible party from recovering under section 107); *Sun Co.*, 124 F.3d at 1189 (finding potentially responsible party limited to section 113 action for contribution).

Pinal Creek Group involved a suit by three mining companies "engaged in voluntary cleanup of hazardous waste site . . . against other potentially responsible parties . . . asserting claim for totality of its cleanup costs and seeking imposition of joint and several liability." *Pinal Creek Group*, 118 F.3d at 1306. The Ninth Circuit refused to permit section 107(a) action by a PRP because "a PRP does not have a claim for the recovery of the totality of its cleanup costs against other PRPs, and a PRP cannot assert a claim against other PRPs for joint and several liability." *Id.* at 1306.

The similar language in *Pinal Creek Group* stated, "while [section] 107 created the right of contribution, the 'machinery' of [section] 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of [section] 107." *Id.* at 1302.

The plaintiffs in *Sun Co.* were virtually in the same position as the plaintiffs in *Centerior* - PRPs incurring costs pursuant to a section 106 administrative order. See *Sun Co.*, 124 F.3d at 1189.

109. See *Centerior*, 153 F.3d at 355. The Sixth Circuit distinguished its prior decision in *Velsicol Chemical Co. v. Enerco, Inc.*, which permitted a PRP to pursue a section 107(a) cost recovery action. See *id.* (citing *Velsicol Chem. Co. v. Enerco, Inc.*, 9 F.3d 524 (6th Cir. 1994)). The prior decision is distinguishable from *Centerior*, according to the *Centerior* court, because in *Velsicol*, the Sixth Circuit "was not confronted with, nor did it address the issue presently before this court. Moreover, the case involved plaintiffs who apparently had initially joined forces with the EPA and state and local government authorities to plan the site cleanup without governmental prodding." *Id.* (citing *Velsicol*, 9 F.3d at 528).

The Sixth Circuit also dismissed any conflict with the Supreme Court's decision in *Key Tronic*. See *Centerior*, 153 F.3d at 356. The Sixth Circuit isolated one phrase used in the Supreme Court's opinion: "the Court's statement that the 'statute now expressly authorizes a cause of action for contribution [section] 113 and impliedly authorizes a similar and somewhat overlapping remedy in [section] 107.'" *Id.* (citing *Key Tronic*, 511 U.S. at 816).

For a detailed discussion of the facts and holding of *Velsicol*, see *supra* notes 90 & 91 and accompanying text. For the facts, holding and rationale of *Key Tronic*, see *supra* notes 80-86 and accompanying text.

110. See *Centerior*, 153 F.3d at 353. The Sixth Circuit found that even if plaintiffs were allowed to pursue a section 107(a) cost recovery action, contribution would ultimately be necessary because it would force the defendants to these actions to file contribution claims against original PRPs. See *id.* at 354. According to the *Centerior* court, plaintiffs' argument is fundamentally flawed because they seek to prolong contribution through unnecessary litigation and expense. See *id.*; see also *Rumpke, Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1238 (7th Cir. 1997)

covery actions exist to protect those parties not responsible for contamination incurring the high cost of their cleanup, plaintiffs, in this case, are not these innocent parties.¹¹¹ As the Sixth Circuit explained, “[c]ontrary to the rosy picture painted by the plaintiffs, they did not come forward in an effort to initiate a site cleanup, but were forced to do so under the compulsion of a [section] 106(a) order facing stiff penalties and fines.”¹¹² Additionally, all incentives to conduct cleanups are not eliminated by this decision, according to the *Centerior* court, because in determining the allocation under section 113(f), “[o]ne of the equitable factors a court may consider is the degree of cooperation of the parties with the government.”¹¹³ The Sixth Circuit, thus, joined a majority of circuit courts of appeals in holding that a potentially responsible party under CERCLA is necessarily limited to an action for contribution under section 113(f).¹¹⁴

V. CRITICAL ANALYSIS

The Sixth Circuit incorrectly held that a potentially responsible party is limited to an action for contribution under CERCLA when seeking reimbursement for hazardous waste cleanup exceeding its

(reaching same conclusion as *Centerior* by proposing 107(a) still available to party directly injured and not attempting to apportion costs); *New Castle County v. Haliburton NUS Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997) (contending although PRP prohibited from 107(a) cost recovery action, innocent parties may still seek section 107 recovery).

111. *See Centerior*, 153 F.3d at 354. The three plaintiffs are Centerior Service Co., General Electric Co., and Ashland Oil, Inc. *See id.* at 344. They either owned and operated the contaminated facility contributing to the damage and threat to the environment or utilized the facility to dispose of substances contributing to this contamination. *See id.* For a discussion of the contamination and cleanup requirements, see *supra* notes 23, 24 & 26 and accompanying text.

112. *Id.* at 354. Following an in-depth investigation, EPA issued an administrative order in accordance with CERCLA section 106 on October 5, 1990. *See id.* at 344. For a discussion of the basis of authority for administrative orders, see *supra* note 25 and accompanying text.

113. *Id.* at 354; *see also* *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997) (limiting PRPs to section 113(f) contribution actions). The plaintiffs in *Pinal Creek Group* contended that the holding, limiting PRPs to action for contribution, “would hamper CERCLA’s policy of promoting rapid and voluntary environmental responses by private parties to the threat posed by hazardous waste sites.” *Id.* at 1304. The *Pinal Creek Group* court did not find this argument persuasive because “other incentives exist for PRPs to conduct clean up operations promptly . . . [a PRP will] protect its on-going operations and be better able to control its cleanup costs, then if it waited for the government to intervene.” *Id.* at 1305.

114. *Centerior*, 153 F.3d at 355. For other jurisdictions limiting responsible parties to an action for contribution, see *supra* note 13 and accompanying text.

rightful share.¹¹⁵ The difficulty with this decision, and similar circuit court decisions, is that they fail to adequately distinguish the narrow holding of the Supreme Court in *Key Tronic Corp. v. United States*.¹¹⁶ Furthermore, these decisions ignore the alternative CERCLA policy goals advanced by permitting certain potentially responsible parties to pursue section 107(a) cost recovery actions.¹¹⁷

The great disparity in procedure and recovery requires an in-depth analysis consistent with the purposes of the statute.¹¹⁸

115. See *id.* (explaining PRPs must pursue action for contribution and are precluded from joint and several cost recovery).

116. For the facts and holding of the Supreme Court in *Key Tronic*, see *supra* notes 80-86 and accompanying text. In *Centerior*, the Sixth Circuit addressed *Key Tronic* in a footnote, finding it distinguishable:

Nor do we find the Supreme Court's decision in *Key Tronic Corp. v. United States*, . . . where the Court held that attorney's fees were not necessary costs of response covered under [section] 107(a), but permitted private litigants to maintain cost recovery actions under the section, preclusive here. The Supreme Court in *Key Tronic* was not directly confronted with the issue of whether PRPs may seek cost recovery. Further, the Court's statement that the 'statute now expressly authorizes a cause of action for contribution in [section] 113 and impliedly authorizes a similar and somewhat overlapping remedy in [section] 107,' . . . actually supports our reading of the statute.

Centerior, 153 F.3d at 355 n.14 (citing *Key Tronic*, 511 U.S. at 816) (citations omitted); see *Pinal Creek Group*, 118 F.3d at 1303 (finding limiting PRPs to contribution action consistent with *Key Tronic*). But see *Adhesives Research Inc. v. American Inks & Coatings, Corp.*, 931 F. Supp. 1231, 1246 (M.D. Pa. 1996) (finding *Key Tronic* Court seems to "implicitly endorse the validity of a PRP cost-recovery action").

117. See *Centerior*, 153 F.3d at 354 (holding PRPs limited to contribution is consistent with CERCLA goal because there are additional incentives for cleanup and government cooperation available under section 113(f)); *United States v. ASARCO, Inc.*, 814 F. Supp. 951, 957 (D. Colo. 1993) (stating that "[t]he possibility of disproportionate liability created by CERCLA 'promotes early settlements, and deters litigation for litigation's sake, and is an integral part of the statutory plan'") (quoting *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990)).

Conversely, in *Adhesives Research, Inc. v. American Inks & Coatings Corp.*, the Middle District of Pennsylvania adopted the minority view that permitting some PRP section 107(a) cost recovery actions is fully consistent with CERCLA:

Under [section] 107 'potentially responsible plaintiffs who initiate an environmental cleanup may sue for cost recovery and initially shift the cost of cleanup to other PRPs. Where plaintiffs are also liable parties, however, defendants may assert counterclaims pursuant to Section 113(f), ensuring that plaintiffs do not escape from paying an equitable share of the cleanup costs.' The court noted that this 'two-step framework' effectuates CERCLA's goals by providing incentives for private parties to promptly initiate cleanup, while simultaneously ensuring that costs will eventually be allocated in an equitable manner.

Adhesives Research Inc., 931 F. Supp. at 1244 (quoting *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1407 (9th Cir. 1997)) (citations omitted).

For a discussion of the policy goals of CERCLA as originally enacted and with the SARA Amendment, see *supra* notes 2 & 4 and accompanying text.

118. For the legislative purpose of CERCLA, see *supra* note 2 and accompanying text.

Although the Sixth Circuit supported its decision with both legislative history and precedent, its attempts to distinguish its prior decision in *Velsicol Chemical Corp. v. Enerco, Inc.*¹¹⁹ and the Supreme Court's decision in *Key Tronic Corp. v. United States*,¹²⁰ were unsuccessful.

A. *Velsicol Chemical Corp. v. Enerco, Inc.*

In its earlier decision, the Sixth Circuit examined whether SARA statute of limitations should be applied retroactively.¹²¹ The *Velsicol* holding established a conclusion contrary to that of *Centerior*, because the effect of the *Velsicol* decision was to reinstate a section 107 cost recovery action brought by a potentially responsible party. The Sixth Circuit distinguished *Velsicol* in *Centerior*, based on two grounds: 1) the earlier decision did not address the specific issue of *Centerior*, but rather, statute of limitations application; and 2) its earlier decision "more closely parallels the question we do not address here [in *Centerior*], whether a plaintiff potentially responsible party who voluntarily initiates a cleanup may neverthe-

119. 9 F.3d 524 (6th Cir. 1993). For a discussion of the Sixth Circuit's holding and rationale in *Velsicol*, see *supra* notes 90 & 91 and accompanying text. To distinguish the *Velsicol* decision, the Sixth Circuit pointed out that plaintiffs' desired CERCLA procedure in *Centerior* inhibits CERCLA:

Such equitable allocation would ultimately result from the plaintiffs' scenario. They tout a 'two step framework' in which PRPs who initiate cleanup may seek joint and several recovery from other PRPs who then may turn around and file contribution claims against the original PRPs. Thus, even under the plaintiffs' framework, contribution ultimately becomes the necessary result. They seek, however, to prolong this result through unnecessary litigation, time and expense.

Centerior, 153 F.3d at 354. The Ninth Circuit supports this rationale, finding "the policy of promoting rapid voluntary cleanups would [not] be undermined to any significant degree . . . other incentives exist for PRPs to conduct cleanup operations promptly." *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1304-05 (9th Cir. 1997).

Courts supporting the minority position, that PRPs may pursue section 107(a) cost recovery actions, find the *Centerior* court's rationale inconsistent with the policy of CERCLA:

[CERCLA's] plain meaning is consistent with effectuating the broad remedial goals of CERCLA by encouraging parties to promptly and voluntarily initiate cleanup or settlement. . . . In permitting PRPs to pursue cost recovery actions, the court provides PRPs who initiate cleanup or settlement with two valuable procedural tools — the longer 6-year statute of limitations, and the shifting of the burden of proof as to divisibility of harm to the defendant PRPs. Contrary to what some would argue, the court does not thereby provide plaintiff PRPs with a windfall.

Adhesives Research Inc. v. American Inks & Coatings Corp., 931 F. Supp. 1231, 1246 (M.D. Pa. 1996).

120. 511 U.S. 809 (1994).

121. For the facts, holding and rationale of the Sixth Circuit in *Velsicol*, see *supra* notes 90 & 91 and accompanying text.

less bring a joint and several cost recovery action.”¹²² These grounds are insufficient to distinguish *Velsicol*, and the Sixth Circuit would have been better served by acknowledging that its prior holding is no longer valid, thereby setting forth a consistent statement regarding potentially responsible party CERCLA reimbursement.¹²³

The first basis for distinguishing *Velsicol*, that it addressed only statute of limitations application, may be eliminated by a thorough reading of the Sixth Circuit’s opinion in *Velsicol*.¹²⁴ The decision prohibited the six-year statute of limitations from applying to a claim’s accrual prior to the 1986 enactment of SARA.¹²⁵ The import of the Sixth Circuit’s language in *Velsicol*, regarding the application of the six-year statute of limitations, defeats its attempt to distinguish the court’s acquiescence to the cost recovery action by a potentially responsible party, which is even more apparent in its rejection of the application of the doctrine of laches to a section 107(a) cost recovery action.¹²⁶ This broad holding, read together with the lack of adjudication requirement and language of section 107(a), fails to adequately distinguish its earlier opinion.

122. *Centerior*, 153 F.3d at 355.

123. *Velsicol*, 9 F.3d at 527.

124. *See id.* at 529. For the statutes of limitations provided by CERCLA, see *supra* notes 10, 59 & 60 and accompanying text.

125. *See id.* Although the Sixth Circuit acknowledged that its previous holding pertains to section 107(a), it refuted that the decision held a section 107(a) action available to a PRP. *See Centerior*, 153 F.3d at 355. The unpersuasive illusion to a different issue is overshadowed by its statement of the holding: “the court reinstated the cost-recovery claim brought by *Velsicol*, which was itself a PRP.” *Id.* (emphasis added). The Sixth Circuit also considered the defenses available in a section 107(a) cost recovery action indicating its understanding of the action being pursued by *Velsicol*. *See id.*

126. *See Velsicol*, 9 F.3d at 530. The analogy of *Velsicol* to a voluntary PRP cleanup is similarly illusory. The *Centerior* court pointed out that in the *Velsicol* case, “EPA was not forced to bring any civil action against the plaintiffs and did not have to issue an administrative order to compel the plaintiffs to initiate cleanup.” *Centerior*, 153 F.3d at 355. This rationale is insufficient, as the holding in *Centerior* is broadly applied to “parties who themselves are PRPs, potentially liable under CERCLA and compelled to initiate a hazardous waste cleanup . . .” *Id.* at 356. This is further supported by the language of the *Centerior* court’s decision itself, stating that “[s]ection 113(f) expressly authorizes the court to allocate response costs between the parties using any equitable factors the court deems appropriate One of the equitable factors a court may consider is the degree of cooperation of the parties with the government.” *Id.* at 354. For a discussion of the equitable factors utilized by courts in apportioning response costs, see *supra* note 69 and accompanying text; *see also* *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997) (refraining from determining issue of innocent parties’ rights under section 107(a)); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997) (holding PRP voluntarily engaged in cleanup limited to 113(f) contribution action).

Second, categorizing the plaintiffs in *Velsicol* as cooperative parties and, thereby distinguishing them from the plaintiffs in *Centerior*, also fails because the degree of cooperation is merely one of the equitable factors to be considered by a court in determining a responsible party's share of the costs after deciding the appropriate remedial action.¹²⁷ Cooperation does not render a party innocent and, therefore, does not resolve the issue of whether an innocent party, a party not at all responsible for the hazardous condition, may pursue a section 107(a) cost recovery action.¹²⁸

B. *Key Tronic Corp. v. United States*

Key Tronic represents the only opinion by the Supreme Court regarding cleanup cost reimbursement under CERCLA as amended by SARA.¹²⁹ Although not directly confronting the availability of cost recovery claims, the Supreme Court expressly classified certain costs as recoverable by potentially responsible parties under section 107(a).¹³⁰ By pointing only to the first principle established by the Supreme Court in *Key Tronic*, that there may be an implied right to contribution under section 107, courts, like the *Centerior* court, distort the rule and fail to facilitate an accurate reflection of the Supreme Court's interpretation of CERCLA.¹³¹ A minority of courts support the opinion that potentially responsible parties may continue to pursue section 107(a) cost recovery actions notwithstanding SARA and, thus, correctly read the three principles of *Key Tronic*.¹³²

127. See *Centerior*, 153 F.3d at 350 (stating that "[c]ost recovery actions by parties not responsible for site contaminations are joint and several cost recovery actions governed exclusively by § 107(a). . . [but] [c]laims by PRPs . . . seeking costs from other PRPs are necessarily actions for contribution, and are therefore governed by the mechanisms set forth in [section] 113(f)"); see also *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996) (holding section 107(a) claim available only to parties not responsible for contamination of relevant site). For a discussion of the factors a court may consider and the widely-utilized Gore factors, see *supra* note 69 and accompanying text.

128. See *Centerior*, 153 F.3d at 355-56 (noting court never addressed specific issue of whether joint and several cost recovery action available for PRP voluntarily initiating cleanup).

129. *Key Tronic Corp. v. United States*, 511 U.S. 809, 810 (1994). For the facts and holding of the Court, see *supra* notes 80-86 and accompanying text.

130. See *id.* at 820 (finding plaintiff PRP "Key Tronic's claim that covers the work performed in identifying other PRP's falls in this category . . . [and] may constitute a necessary cost of response in and of itself under the terms of [section] 107(a)(4)(B)").

131. For the Sixth Circuit's analysis of the Supreme Court's ruling in *Key Tronic*, see *supra* note 116 and accompanying text.

132. See, e.g., *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1489, 1503 (9th Cir. 1997) (finding the only PRP section 107 claim is one "for contribu-

VI. IMPACT

The Sixth Circuit's decision in *Centerior* is significant insofar as it increases the majority of circuits limiting potentially responsible party recovery to section 113(f) contribution actions.¹³³ The decision purports to limit section 107(a) to its alleged original purpose of providing a simple and complete method for non-responsible parties to recover their costs for cleanup of contaminated sites.¹³⁴ The holding may have very little impact within the Sixth Circuit, however, since it fails to overrule *Velsicol*.¹³⁵ Thus, courts may, and should, limit the holding to its particular fact situation.¹³⁶

Moreover, the *Centerior* decision may also be greatly diminished by the possibility of a Supreme Court ruling interpreting CERCLA as amended by SARA.¹³⁷ A Supreme Court decision that comports with its earlier decision in *Key Tronic* and contains an *explicit rule* - a potentially responsible party may continue to seek a cost recovery claim under section 107 - would overrule the majority of appellate courts holding otherwise, rendering *Centerior* contrary to federal law.

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tion against those treated as joint tortfeasors") (quoting *Key Tronic*, 511 U.S. at 818 n.11).

133. For a list of courts supporting the Sixth Circuit, see *supra* note 13 and accompanying text.

134. See *Centerior*, 153 F.3d at 352 (leaving open question of whether innocent parties or volunteer PRPs may pursue section 107 joint and several recovery). For a discussion of CERCLA policy, see *supra* notes 2, 4 & 6 and accompanying text.

135. See *Centerior*, 153 F.3d at 355. The Sixth Circuit spent significant effort to distinguish the *Centerior* facts from those of *Velsicol* in order to avoid overruling its earlier decision. See *id.* For a detailed analysis of the Sixth Circuit's efforts, see *supra* notes 119 & 125-27 and accompanying text.

136. For the facts, holding and rationale of the Sixth Circuit's seemingly contrary opinions, see *supra* notes 21-31 & 90-91 and accompanying text.

137. For the legislative history and rationale of CERCLA as amended by SARA, see *supra* notes 4 & 6 and accompanying text.